IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs October 28, 2003

STATE OF TENNESSEE v. BOYD FREEMAN

Appeal from the Criminal Court for Sevier County
No. 8768 Richard R. Vance, Judge

No. E2003-00109-CCA-R3-CD
March 1, 2004

The defendant, Boyd Freeman, pled guilty to two counts of aggravated sexual battery and two counts of rape of a child. See Tenn. Code Ann. §§ 39-13-504, 39-13-522. The trial court imposed a ten-year sentence on each aggravated sexual battery offense and a twenty-three-year sentence on each rape of a child offense. The sentences were ordered to be served concurrently, for an effective sentence of twenty-three years. In this appeal of right, the defendant contends that his sentence is excessive. The judgments are affirmed.

Tenn. R. App. P. 3; Judgments of the Trial Court Affirmed

GARY R. WADE, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ALAN E. GLENN, JJ., joined.

Micaela Burnham-Russell, Sevierville, Tennessee, for the appellant, Boyd Freeman.

Paul G. Summers, Attorney General & Reporter; Jennifer L. Bledsoe, Assistant Attorney General; and Steven R. Hawkins, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The defendant, Boyd Freeman, was indicted on two counts of aggravated sexual battery, a Class B felony, see Tenn. Code Ann. § 39-13-504, and two counts of rape of a child, a Class A felony, see Tenn. Code Ann. § 39-13-522. The defendant entered a guilty plea to each count. By the terms of the plea agreement, the trial judge was to determine the lengths of the sentences and the manner of service. At the submission hearing, the assistant district attorney summarized the facts as follows:

> [T]he fact[s] would have shown that this defendant is a step-grandfather to [C.H. and

V.H.],[1] ages seven and four. That he was keeping them on an occasion[] here in Sevier County. That on that occasion he had them put their mouths on his penis. This all occurred in – basically one incident, but he had both of them do that, and that he did touch their vagina area. That the girls told their mother about that.

At the sentencing hearing, Detective Mark Holt, who interviewed the defendant, observed that "in twenty years of . . . law enforcement . . . this is unique, because I hadn't had this situation before. [The defendant] was very remorseful. I remember him crying during his confession." Wendell Waller, the defendant's employer, provided favorable testimony for the defense. He described the defendant as a good employee and remarked that he would still be employed but for his arrest.

The defendant's wife of twelve years, Judy Freeman, testified that the victims were her grandchildren by a daughter from her first marriage. She considered the sexual misconduct completely out of character for the defendant. According to Ms. Freeman, the defendant confessed to her and expressed remorse as soon as he was confronted by the police. She stated that the offenses had strained the relationship she had with her daughter and that the victims, who were in counseling, "pray for [the defendant], because he needs help."

Richard Everett, the defendant's pastor, testified that the defendant and his wife attended church regularly and were "very active in the ministry of the church." He was aware that the defendant confessed to the offenses and had taken responsibility for his misdeeds. Another of the defendant's employers, Joe Arden, testified that the defendant was a "hard worker" and "very honest."

The fifty-one-year-old defendant, who had been employed as a diesel mechanic since his retirement in 1993 after over twenty years in the Army, testified that he had never been previously charged with any offense and had no explanation for his actions. The defendant expressed "absolutely no excuses for it happening. I've said that before and I'll say it again. I will accept responsibility for my actions."

In arriving at the sentences, the trial court applied the following enhancement factors:

(7) The personal injuries inflicted upon or the amount of damage to property sustained by or taken from the victim was particularly great;

(8) the offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement; and

(16) the defendant abused a position of public or private trust, or used a special skill in a manner that significantly facilitated the commission or fulfillment of the offense.

---

[1] It is the policy of this court to withhold the identities of minor victims of sex crimes.

See Tenn. Code Ann. § 40-35-114 (Supp. 2002).[2] The trial court determined that enhancement factor (16) warranted an enhancement to the maximum sentence of 25 years for each of the rape offenses. In mitigation, however, the trial court reduced the terms by two years because the defendant was genuinely remorseful, accepting full responsibility for his conduct. See Tenn. Code Ann. § 40-35-113(13) ("any other factor consistent with the purposes of this chapter"). The trial court imposed concurrent, mid-range ten-year sentences for the aggravated sexual battery offenses.

In this appeal, the defendant asserts that the trial court erred by the application of enhancement and mitigating factors. When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). The presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see State v. Jones, 883 S.W.2d 597, 600 (Tenn. 1994). "If the trial court applies inappropriate factors or otherwise fails to follow the 1989 Sentencing Act, the presumption of correctness falls." State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987). If the trial court's findings of fact are adequately supported by the record, this court may not modify the sentence even if it would have preferred a different result. State v. Fletcher, 805 S.W.2d 785 (Tenn. Crim. App. 1991).

Initially, the defendant contends that the trial court erred by applying enhancement factor (5), that the victims were particularly vulnerable because of their ages. He argues that no particular vulnerability was shown. As the state correctly notes, however, the trial court considered this factor but declined to apply it to any of the defendant's convictions on the ground that it was not supported by the record. This issue is, therefore, without merit.

Next, the defendant asserts that the trial court erred by applying enhancement factor (7), that the personal injuries suffered by the victims were particularly great. He argues that psychological injuries are inherent in child sexual abuse cases and that the record does not support a finding that the victims' mental injuries were especially serious or severe.

---

[2] Effective July 4, 2002, the legislature has amended Tennessee Code Annotated section 40-35-114 by renumbering the original enhancement factors (1) thru (20) and including as enhancement factor (1) that "the offense was an act of terrorism, or was related to an act of terrorism." Although the trial court used the numbering contained in the old statute, we use the correct new numbering herein.

The term "personal injury" contained in enhancement factor (7) embraces the "emotional injuries and psychological scarring sustained by the victim of a sexual offense." State v. Melvin, 913 S.W.2d 195, 203 (Tenn. Crim. App. 1995). Before this factor may be applied, however, it must be demonstrated that the emotional injuries and psychological scarring were "particularly great." Id. Recently, in State v. Arnett, 49 S.W.3d 250, 260 (Tenn. 2001), our supreme court held that "application of [enhancement factor (7)] is appropriate where there is specific and objective evidence demonstrating how the victim's mental injury is more serious or more severe than that which normally results from this offense. Such proof may be presented by the victim's testimony, as well as the testimony of witnesses acquainted with the victim."

The victim impact statement completed by the victims' mother establishes that the victims attended counseling for approximately six months after the offenses. It also indicates that the victims and their mother "moved out of [her] mother[']s house because of bad dreams and the fact that [the victims] didn't feel safe." The defendant's wife, Judy Freeman, confirmed that the victims were in counseling. Otherwise, there is no information in the record describing the nature of the emotional injuries sustained by the victims. In our view, this record does not demonstrate that the victims' mental injuries were, as required by law, "more serious or severe than that which normally results from this offense." See id.; see also State v. Jonathan D. Rosenbalm, No. E2002-00324-CCA-R3-CD (Tenn. Crim. App., at Knoxville, Dec. 9, 2002) (applying enhancement factor (7) in rape and incest case where victim became suicidal, experienced a dramatic weight loss, and performed poorly in school after the offense). Accordingly, enhancement factor (7) should not have been applied.

The defendant next argues that the trial court erred by applying enhancement factor (8), that the offenses involved victims and were committed to gratify the defendant's desire for pleasure and excitement. He contends that there is no evidence that he committed the offenses for sexual gratification. Pointing out that the defendant ejaculated during commission of the offenses, the state asserts that the enhancement factor was properly applied.

Our supreme court has held that enhancement factor (8) may be applied to rape convictions because rape is frequently committed for reasons other than sexual pleasure or excitement. See Arnett, 49 S.W.3d at 261–62; State v. Kissinger, 922 S.W.2d 482, 490 (Tenn. 1996); State v. Adams, 864 S.W.2d 31, 35 (Tenn. 1993). The critical inquiry in determining the applicability of this factor "is the determination of the defendant's motive for committing the offense." Arnett, 49 S.W.3d at 261 (emphasis in original). Further, "[t]he motive [for commission of the offense] need not be singular for the factor to apply, so long as [the] defendant is motivated by [a] desire for pleasure or excitement." Kissinger, 922 S.W.2d at 490. "[P]roper application of factor [(8)] requires the [s]tate to provide additional objective evidence of the defendant's motivation to seek pleasure or excitement through sexual assault." Arnett, 49 S.W.3d at 262. Such evidence includes, but is not limited to, sexually explicit remarks and overt sexual displays, such as fondling and kissing a victim, or "remarks or behavior demonstrating the defendant's enjoyment of the sheer violence of the rape." Id.

When asked why the offenses occurred, the defendant testified, "I can't answer that question because I don't know why it happened." The transcript of the sentencing hearing indicates that the

trial court based its application of enhancement factor (8) on the sex offender risk assessment completed on the defendant after the offenses. While the applicability of the factor is a close question, it is our view that the record supports the trial court's determination. The sex offender risk assessment indicates that the defendant's denial of previous, similar sexual thoughts was contradicted by the circumstances of the offense. Because "he had his penis out and was 'playing' with it prior to the victims entering the room," the conclusion expressed in the report was that the defendant had prior sexual fantasies of the nature of the offense. In addition to placing his penis in the victims' mouths, the defendant placed his hands in the victims' underpants and fondled their vaginas. These circumstances warrant the application of enhancement factor (8).

As mitigating factors, the trial court found that the defendant was genuinely remorseful and that he had admitted his conduct to authorities. See Tenn. Code Ann. §§ 40-35-113(13). The defendant argues that the trial court also should have applied his lack of criminal history as a mitigating factor. See id. Although the record reflects that the defendant has no prior convictions, courts are not required to consider this as a mitigating factor. See State v. Williams, 920 S.W.2d 247, 261 (Tenn. Crim. App. 1995).

In summary, the trial court erred by applying enhancement factor (7), that the personal injuries inflicted upon the victims were particularly great. It properly applied enhancement factors (8), that the offense involved a victim and was committed to gratify the defendant's desire for pleasure, and (16), that the defendant abused a position of public or private trust to facilitate commission of the offenses.

In calculating the sentence for a Class A felony conviction, the presumptive sentence is the midpoint within the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). If there are enhancement but no mitigating factors, the trial court may set the sentence at or above the midpoint. Tenn. Code Ann. § 40-35-210(d). If there are mitigating factors but no enhancement factors, the trial court shall set the sentence at or below the midpoint. Id. A sentence involving both enhancement and mitigating factors requires an assignment of relative weight for the enhancement factors as a means of increasing the sentence. Tenn. Code Ann. § 40-35-210(e). The sentence should then be reduced within the range by any weight assigned to the mitigating factors present. Id.

In calculating the sentence for a Class B, C, D, or E felony conviction, the presumptive sentence is the minimum in the range if there are no enhancing or mitigating factors. Tenn. Code Ann. § 40-35-210(c). If there are enhancing but no mitigating factors, the trial court may set the sentence above the minimum, but still within the range. Tenn. Code Ann. § 40-35-210(d). A sentence involving both enhancing but no mitigating factors requires an assignment of relative weight for the enhancement factors as a means of increasing the sentence. Tenn. Code Ann. § 40-35-210(e). The sentence must then be reduced within the range by any weight assigned to the mitigating factors present. Id.

A Range I sentence for rape of a child, a Class A felony, is fifteen to twenty-five years. Tenn. Code Ann. § 40-35-112(a)(1). A Range I sentence for aggravated sexual battery, a Class B felony,

is eight to twelve years. Tenn. Code Ann. § 40-35-112(a)(2). Here, the trial court determined that the enhancement factors warranted maximum sentences of twenty-five years for the rape convictions, but lowered the sentences to twenty-three years based upon the mitigating factors. Based on the same considerations, the trial court set the aggravated sexual battery sentences at ten years each, the middle of the range. In doing so, the trial court placed great weight on enhancement factor (16):

> #[16] . . . is a very significant factor. These two children were [the defendant's] step-grandchildren. He was given the care and duty to look after them, and in fact was in the position of protector of these children and should have been a protector instead of a perpetrator. Clearly, that factor applies in this case, and was significant in placing [the defendant] in that position where that trust was abused. So that is a significant factor, and probably the most important factor that the [c]ourt sees . . . all of which, and particularly #[16], will justify the imposition of the maximum sentence in this case.

Later, at a hearing on the defendant's motion to modify his sentences, the trial court stated:

> [T]he principle ground upon which the [c]ourt enhanced the sentence was No. [16], and that is the abuse of the position of trust. Even without the others, it was my conclusion then and it is now, whether anything else applied, No. [16] was such an overwhelming aggravating circumstance that it alone would have justified imposition of maximum sentences.

Although the trial court misapplied enhancement factor (7), it is our view that the sentences imposed were warranted by the entirety of the circumstances. The weight to be afforded an existing factor is discretionary so long as the trial court complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. State v. Boggs, 932 S.W.2d 467, 475 (Tenn. Crim. App. 1996). The weight to be afforded mitigating and enhancing factors derives from balancing relative degrees of culpability within the totality of the circumstances of the case involved. Id. at 476; see also State v. Marshall, 870 S.W.2d 532, 541 (Tenn. Crim. App. 1993). There were two applicable enhancement factors, one of which the trial court determined was entitled to great weight. Although the defendant was a first time offender and admitted his guilt, the offenses were so serious, involving the violation of a position of trust to gratify his own sexual desires, that the sentences imposed were fully warranted.

Accordingly, the judgments of the trial court are affirmed.

_____

GARY R. WADE, PRESIDING JUDGE